In the Matter of	)	
	)	
Somos, Inc. Petition for Declaratory Ruling	)	WC Docket No. 95-155
	)	
Regarding Registration of Text-Enabled	)	WT Docket No. 08-7
	)	
Toll-Free Numbers	)	
	)	

ZIPWHIP, INC. OPPOSITION TO PETITION FOR DECLARATORY RULING

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SUMMARY

For nearly nine months, Somos, Inc. (Somos) has been filing in WT Docket 08-7, seeking to convince the Wireless Telecommunications Bureau that texting services, which heretofore have been treated as information services, should be regulated by the Commission. With this petition, however, Somos reverses course, and now seeks a "declaratory ruling" that relies on the proposition that toll-free texting has been regulated all along.

Somos is wrong on both counts: It is wrong in arguing that the toll-free texting market requires regulation at this time, and it is wrong in asserting that its proposed "declaratory ruling" is anything but a new rule that requires the FCC to conduct notice and comment rulemaking before adopting.

First, Somos's petition is procedurally defective. Somos asks the FCC to establish two obligations that are not present in any existing FCC regulations – an obligation to obtain RespOrg authorization (rather than subscriber authorization) before text-enabling a toll-free number and an obligation to register all text-enabled toll-free numbers in a private database created by Somos. Somos is wrong in posturing such a request as a declaratory ruling. A declaratory ruling is used to clarify existing law, by terminating an existing controversy or removing uncertainty over application of the current laws. Its petition seeks neither objective. Indeed, reading Somos' petition, one is hard pressed to identify which FCC orders or regulations purportedly mandates the two obligations it requests. Somos simply doesn't bother to identify any existing rules that require the outcomes it seeks.

The reason for this is plain: Somos does not in fact seek clarification of existing law; Somos seeks to change the existing law and establish two wholly new obligations. The proper procedural vehicle for doing so is through a petition for rulemaking, not a petition for declaratory ruling. Therefore, the Commission should dismiss Somos' petition as procedurally improper, and instruct Somos to submit a petition for rulemaking should it seek to implement rules applicable to toll-free texting.[1]

Second, Somos is wrong in contending that the two rules it seeks are needed. As Zipwhip has explained in its white paper, "The Truth about Texting on Toll-Free," the ability to text to toll-free numbers is a recent development. It was empowered by Zipwhip's innovative routing infrastructure and is growing as a result of a healthy market of multiple service providers and major brands adopting texting as a consumer communication channel. Somos' claims of potential damage to the toll-free market are unfounded. Zipwhip and the industry operate by the principle that the subscriber controls the use of its number, and Zipwhip has implemented multi-factored validation procedures to verify the subscriber associated with a particular number. Somos, however, seeks to undercut subscriber control and insert RespOrgs – organizations that are supposed to be mere agents for subscribers – in a controlling position in the market. Somos then seeks to establish a regulation-mandated monopoly for its commercial database, giving it a leg up on all other methods to verify subscriber identity. None of these actions are appropriate for a nascent, competitive market without barriers to entry.

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[1]   Alternatively, the Commission can treat Somos's petition as a petition for rulemaking. In that case, however, the next step would be either a Notice of Proposed Rulemaking or a Notice of Inquiry on the topic of toll-free texting.

TABLE OF CONTENTS

In the Matter of	)	
	)	
Somos, Inc. Petition for Declaratory Ruling	)	WC Docket No. 95-155
	)	
Regarding Registration of Text-Enabled	)	WT Docket No. 08-7
	)	
Toll-Free Numbers	)	
	)	

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Zipwhip, Inc. (Zipwhip), by and through undersigned counsel, hereby files

comments in response to Somos, Inc.'s (Somos) petition for declaratory ruling regarding the

registration of text-enabled toll-free numbers.[2]

I.   A PETITION FOR DECLARATORY RULING IS NOT THE PROPER PROCEDURAL METHOD FOR ADDRESSING THE ISSUES RAISED.

After many months of attempting to convince the Wireless Telecommunications

Bureau that it is appropriate to classify texting services as telecommunications services, Somos's

petition reverses course and argues that toll-free texting has, in effect, been regulated all along.

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[2]   Petition of Somos, Inc. for a Declaratory Ruling Regarding Registration of Text-Enabled Toll-Free Numbers, WC Docket No. 95-155 (filed Oct. 28, 2016) (Somos Petition). *See* Public Notice, Wireline Competition Bureau Seeks Comment on Somos, Inc. Petition for Declaratory Ruling Regarding Registration of Text-Enabled Toll-Free Numbers, DA 16-1259 (rel. Nov. 4, 2016). The Public Notice requests comment be filed in both WC Docket No. 95-155 and WT Docket No. 08-7.

Somos now contends that the Commission's existing rules address toll-free texting and requests that the Commission mandate two new obligations:

i) that a provider "may text-enable a Toll-Free number only if it has sought appropriate authorization from the Responsible Organization (RespOrg); and

ii) that any text-enabled Toll-Free numbers be registered with Somos' TSS Registry.[3]

Somos's requests, however, are not requests for declaratory ruling. Instead, they are requests for new rules, rules that must be created through a notice and comment rulemaking proceeding. For this reason, Somos's petition is defective, and should be dismissed.

A. **A Petition For Declaratory Ruling May Only Be Used To Provide Clarification Of An Existing Rule Or To Remove Uncertainty, Not To Substantively Change A Rule.**

Under Section 1.2 of the Commission's rules, the Commission is authorized to issue a declaratory ruling on its own motion or in response to a petition.[4] A petition for declaratory ruling is a procedural tool intended to be used for the specific purpose of "terminating a controversy or removing uncertainty."[5] Declaratory rulings (sometimes referred

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[3] Somos Petition at 2.

[4] 47 C.F.R. § 1.2.

[5] *Amendment of Part 15 of the Commission's Rules to Amend the Definition of Auditory Assistance Device in Support of Simultaneous Language Interpretation*, ET Docket No. 10-26, Order and Notice of Proposed Rulemaking, FCC 11-133 (rel. Sept. 16, 2011) ("Part 15 Amendment Order") ¶ 10; *see City of Arlington, Texas v. FCC*, 668 F.3d 229, 241 (5th Cir. 2012) (explaining that Commission rule §1.2 granting the power for declaratory rulings derives from § 554(e) of the APA).

to as interpretative rules) "may not be used to substantively change a rule."[6] As a result, the

Commission has frequently declined to grant the relief sought in a declaratory ruling when it

would result in a substantive change in the rules.[7]

A rule that would "effectively amend" an earlier rule is a rulemaking and must

therefore, comport with the proper notice-and comment requirements under the Administrative

Procedure Act (APA).[8] Under the APA, the Commission must provide notice of a proposed

rulemaking by publication in the *Federal Register* and give interested person an opportunity to

participate and make submissions.[9] Legal and regulatory precedent consistently demonstrates

that to expand the scope of existing rules or rewrite its regulations the Commission must use the

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[6] *Part 15 Amendment* Order, ¶ 10; *See U.S. Telecom Association v. FCC*, 400 F.3d 29, 35
(D.C. Cir 2005) ("[F]idelity to the rulemaking requirements of the APA bars courts from
permitting agencies to avoid those requirements by calling a substantive regulatory
change an interpretative rule.").

[7] *See e.g.*, Part 15 Amendment Order ¶ 2 (declining petitioner's statutory interpretation
because it would expand the definition so significantly it would essentially be a rule
change); *Petition of STi Prepaid, LLC for Declaratory Ruling, or in the Alternative,
Petition for Waiver*, 28 FCC Rcd 00153 (2013) (denying a petition for declaratory ruling,
but granting a waiver, because the existing rule was clear and "no controversy or
uncertainty exists"); *Commnet Wireless, LLC Petition for Declaratory Ruling*, 27 FCC
Rcd 4324 (WTB 2012) (dismissing petition and noting that the Commission uses the
rulemaking process to promulgate new requirements); *North American
Telecommunications Association*, 101 FCC 2d 349, 371 (1985) (classification of services
under existing rule may be accomplished through declaratory ruling, but rule changes
more appropriately handled in rulemaking).

[8] *See U.S. Telecom* Association *v. FCC*, 400 F.3d 29, 34-35 (D.C. Cir 2005); *see also* Part
15 Amendment Order ¶ 13 (choosing to adopt a notice of proposed rulemaking instead of
the declaratory ruling petitioner sought).

[9] *See id.* at 40.

appropriate process of notice of proposed rulemaking which complies with notice and comment requirements.

B.   Somos' Petition Is Procedurally Deficient And Should Be Dismissed As It Seeks Approval For Oversight And Management In An Area Not Previously Addressed By The Commission.

Despite Somos's characterization of its request as a clarification of existing rules, the rulings it requests, in fact, would represent a significant substantive change from any current regulations. Therefore, the petition for declaratory ruling is not the appropriate vehicle for addressing this matter and it should be dismissed.

Currently, there are no FCC rules relating to the text-enabling of toll-free numbers. Indeed, as WT Docket 08-7 demonstrates, the FCC has not even determined the regulatory classification of texting services in the first place. Unless and until the Commission does so, it is nonsensical to assert that the FCC's regulation of telecommunications services is applicable to texting services.

Moreover, Somos's requested rulings clearly are prospective and prescriptive in nature. Somos asks for two rules that would govern what a provider seeking to text-enable a toll-free number must do in order to implement its request. This request is similar to the request addressed in *Commnet*, whereby the petitioner sought to establish a rule relating to pole attachments on a "prospective only" basis. In that case, the FCC explained:

> In its Petition, Commnet does not suggest that the requirement it has proposed is mandated by any statutory provision, rule or order, and Commnet does not point the Commission toward any such authority that it contends should be interpreted or clarified as inherently imposing this requirement. Rather, it requests that the Commission invoke "principles" of antitrust or telecommunications law to

establish a new requirement that would extend to CMRS providers obligations similar to those that section 224 of the Act currently places on utility pole owners. Thus, the relief requested cannot appropriately be imposed by a declaratory ruling.[10]

Somos's request, like the Commnet request, does not point to any statutory provision, rule or order that inherently imposes the requirements it seeks. Instead, like Commnet, it seeks to invoke principles of FCC regulation, most notably, FCC authority under 47 U.S.C. § 251(e)(1), to justify extension of the Commission's voice regulations to toll-free texting. Such relief amounts to a rulemaking, and cannot be imposed by a declaratory ruling.

Moreover, Somos' request deviates significantly from the Commission's historical purpose for establishing the SMS/800 database and established understanding of its role in the toll-free number ecosystem. The Commission required the creation of a centralized database system, which became the Service Management System (SMS), in order to ensure number portability across service providers.[11] The Commission has continued to describe Somos (formerly SMS/800, Inc.) in terms of its role and responsibilities with respect to telecommunications services. In 2016, the Commission described the RespOrg's role as providing the toll-free number for interexchange services and "managing the record for the number."[12] Currently, there is nothing in the Commission's discussion of Somos or the role of

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10   Commnet, 27 FCC Rcd 4324 at ¶ 3 (footnotes omitted).

11   *See Toll Free Service Access Codes, Petition to Change the Composition of SMS/800, Inc.*, CC Docket No. 95-155, WC Docket No. 12-260, Order, FCC 13-146 (rel. Nov. 1, 2013) ¶ 4.

12   *See Toll-free Service Access Codes*, CC Docket No. 95-155, Order, DA 16-650 (rel. June 10, 2016) n. 2.

RespOrgs to indicate an understanding that the toll-free database management involves the authority to decide for subscribers how they can use a number or a role in managing anything other than voice services. Any such extension of that authority would constitute a substantive change in the rule, which requires a rulemaking.

The scope and substance of Somos' petition does not comport with any reasonable interpretation or understanding of the purpose of declaratory ruling and therefore, the Commission should dismiss the request as being procedurally deficient.

II. THE TEXTING ON TOLL-FREE MARKET IS NASCENT AND STILL EVOLVING.

Separate from the procedural deficiencies of the petition, Somos is wrong in contending that the two rules it seeks are needed. As Zipwhip has explained in its white paper, "The Truth about Texting On Toll-Free," the ability to text to toll-free numbers is a recent development. [13] It was empowered by Zipwhip's innovative routing infrastructure and is growing as a result of a healthy market of multiple service providers and major brands adopting texting as a consumer communication channel. Somos's claims of potential harm in the market are unfounded.

A. There Were Limited Options For Businesses To Engage Customers Via Text Before Zipwhip's Marketplace Innovations.

When an individual texts with a business, the conversation appears in the default messaging app, just like texts with friends and family. The operations behind the scenes,

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[13]   *See ex parte* filing of Zipwhip, Inc., Attachment – The Truth About Texting on Toll-Free, WT Docket No. 08-7 (Nov. 18, 2016). Attached as Exhibit 1.

however, are very different. Generally, business texting employs application-to-person (A2P) protocols as opposed to the person-to-person (P2P) ones used for consumer texting. A2P and P2P texting traffic are handled differently at the network level for technical and commercial reasons, not the least of which is consumer protection.

P2P texts can be sent by anyone with a mobile account but A2P protocols are designed to manage high-volume traffic. Each wireless operator negotiates separate service level agreements (SLA) to establish safeguards before enabling a service provider to send high-volume A2P traffic. The SLA limits risk of spam, spoofing and other anti-consumer practices that could otherwise result from the high-volume A2P connection.

Before 2014, there was no infrastructure to support A2P texting on 10-digit phone numbers. Therefore, short codes offered the only operator-supported channel for high-volume A2P business texting.[14] However, short codes are imperfect and businesses demanded a better texting product. Zipwhip spent two years building the infrastructure that make it possible for A2P text messaging to travel safely over 10-digit phone numbers, including toll-free numbers.[15] Today, all of the major wireless carriers support texting to toll-free and some support it on landline numbers as well.

Zipwhip helped innovate the options for using landline and toll-free technology for businesses by introducing A2P business texting on toll-free in a way that has helped to extend

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[14]   *See* Yahoo Finance, *Zipwhip Toll-free Texting Now Supports 1,000 SMS/Second,* Press Release, Sept. 24, 2015 ("Yahoo Press Release").

[15]   *See id.*

the life and relevance of the toll-free industry and benefitting all participants, including

consumers, toll-free subscribers, businesses, RespOrgs and the toll-free database administrator,

Somos. Each wireless operator has different requirements and supports different technical

protocols for exchanging A2P text traffic, but Zipwhip built an easy, uniform front-end interface

to enable texting across these various platforms. Zipwhip's A2P texting infrastructure provides

cross-carrier connectivity to any company that wants it, however they want it. Small businesses

purchase software, enterprises purchase API, and larger aggregators purchase SMPP. Zipwhip's

infrastructure provides a single interface for termination of commercial volumes.

B.   **Texting on Landline and Toll-Free Services are Being Rapidly Adopted by Both Small and Large Businesses, Largely Due to Zipwhip's Activities.**

The market for business texting, which includes landline and toll-free numbers, is

thriving due to investment and innovations by Zipwhip. The market for business messaging is

expected to grow to a $60 billion industry by 2018.[16] Also, texting on toll-free is one of the

fastest-growing areas of business texting, growing at a healthy rate of 300 percent year-on-year.

It is estimated that there could be up to 60 cases for texting within a single organization. Well-

known brands like Google, Butterball and Nestle are embracing the service. This level of

acceptance is truly amazing when you consider that commercial texting on toll-free phone

numbers is barely three years old and AT&T only turned on A2P toll-free texting capability in

August 2015.

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[16]   *See* Steve French, "The Resurgence of E2P Messaging and What it Means for Your Business." OpenMarket Blog. (Sept 10, 2015).

Additionally, Zipwhip's use of A2P channels has created systems and safeguards that enable a trusted texting to toll-free ecosystem to exist. With A2P, there are consumer protection requirements incorporated into every SLA that specify support for things like fraud monitoring, CALEA compliance, and consumer opt-out controls like the "STOP" command.[17] Messaging providers that forgo the SLA to send A2P-caliber traffic over the P2P channel are usually violating their terms of service by using the wrong channel and may also encounter spam filters that block their traffic.[18] This approach benefits businesses and consumers by providing access to business texting while preventing abuse.

C. The Industry Has Developed Around the Core Principle That The Subscriber Controls the Use of Its Number.

The industry has developed around the core principle that the subscriber, not the messaging provider, an agent or any other entity, controls the use of its toll-free or landline number. This principle is consistent with the FCC's approach in other contexts.[19] Adhering to the principle is important because businesses invest significant resources to maintain and promote their phone numbers in marketing campaigns. For toll-free texting, the key factor is

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[17] *See id.*

[18] Fact Atlas. "Choice and Innovation: Safeguarding the SMS Marketplace." Exhibit to letter from Anna Henningsgaard, Fact Atlas, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 08-7 (Dec. 21, 2015) ("Fact Atlas White Paper").

[19] *See, e.g.* 47 U.S.C. § 258 (prohibiting changes in a presubscribed carrier without authorization from the subscriber obtained consistent with FCC procedures).

validation of the subscriber's identity and "ownership"[20] of the number. There is no technical reason or policy justification for removing the subscriber's rights and giving them to a third-party as Somos is requesting.

The subscriber control principle is a core foundation of Zipwhip's process for enabling texting for business customers. Zipwhip has incorporated a number of layers of verification in its authorization process to instill integrity and security for toll-free subscribers and consumers sending texts to businesses. In one key component of this verification, Zipwhip makes a call to the number being provisioned and has a real human-to-human conversation to ensure that the customer seeking to enable a number indeed has control over it. This step ensures that voice calling and texting services terminate at the same destination and is similar to the accepted process used by modern businesses. Zipwhip may, in instances where subscriber identity is still in doubt, also consult a registry to facilitate the verification process. Other potential verification methods includes the receipt of a letter of authorization from each potential texting on toll-free customer and a rigorous vetting process of the individual point of contact and the business. Further, sensitive numbers, like official government toll-free numbers or shared numbers are more rigorously vetted.

Zipwhip is confident that its multi-factor validation process is superior to the RespOrg approval process that Somos proposes in its petition. But, so long as both processes are striving toward resolution of the same issue (identity of the toll-free subscriber) and both can

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[20] Zipwhip recognizes and supports the Commission's oft-stated canon that numbers cannot be owned, and uses the term only as a colloquialism for the provisional control subscribers have for the period of time they choose to subscribe to the use of a number.

achieve that goal, it makes no sense to mandate one process over all others. Rather, a healthy

and vibrant market would develop multiple methods to validate subscriber control, and a

regulator does not need to interfere with the market's choices among those methods.[21]

D. Somos' Petition Asks To Do Away With The Subscriber Control Principle, And Replace It With A Model Of RespOrg Control.

The subscriber, not the RespOrg, controls the number. Somos asserts that there

"presumably" is no dispute as to this principle (Petition at 12), but it is Somos's approach that

undercuts that principle, not the practices of others in the industry. The RespOrg was designated

by the Commission as an agent for the subscriber in the limited context of number portability for

toll-free voice services.[22] The Commission has not authorized Somos or the RespOrgs to operate

in any other capacity.[23]

The Commission's 800 service proceedings show that RespOrgs were created out

of a fear that long distance carriers would impede the subscriber's exercise of portability.[24]

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[21] This is similar to the way in which verification is conducted for changes in presubscribed carriers. The FCC has set minimum requirements for verification of subscriber authorization, but allows service providers to use multiple methods to obtain that verification.

[22] *See, e.g.,* Provision of Access for 800 Service, Order, 8 FCC Rcd 1423 (1993) (concluding that SMS access is incidental to the provision of 800 access services and should be offered on a common carrier basis); *cf.* Somos Tariff (March 2016), §§ 2.3; 3.6.1 (explaining the RespOrg is identified by the subscriber or their agent and that to change RespOrgs requires authorization by a letter of agency).

[23] As noted, whether the Commission may decide to expand this authorization is a rulemaking question, and cannot be decided in response to this petition.

[24] *See, e.g.,* SMS/800 Governance Structure Order ¶ 4-5 (discussing the history of the SMS/800 database system).

RespOrgs were created to facilitate the allocation of numbers and to enable subscriber choice, such as the exercise of portability of toll-free numbers. However, subscribers maintain ultimate control, including the control over the selection of a RespOrg for its numbers.[25]

If the Commission were to grant Somos's petition, the RespOrg would receive a powerful ability to approve texting uses of a number, undermining the right of the subscriber to do so. For example, if a service provider contracts with the toll-free subscriber (and validates that subscriber's identity), by what right can the RespOrg deny that authorization? At best, RespOrg approval would impose additional delay – requiring reconfirmation of the validation already conducted. At worst, the RespOrg could use its position to deny or delay the subscriber's choice, perhaps to offer its own texting service instead of the chosen service provider's service. Either way, there is no reason to insert the RespOrg in the way of the subscriber's choice.

III. SOMOS'S TSS REGISTRY IS NOT MANDATED BY THE CURRENT RULES AND SHOULD NOT BE GIVEN SUCH A MANDATE BY THE COMMISSION.

Somos's second proposed new rule is a rule that would mandate a special role for its Text and Smart Services (TSS) Registry. Somos makes it appear that its TSS Registry is somehow connected to the SMS/800 database, a database that was created as a result of a Commission mandate.

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[25]   Subscribers are permitted to operate as their own RespOrg, if they possess the technical capabilities to do so.

The TSS Registry, however, is different from the SMS/800 database. It is not authorized by any FCC order. A search of a commercially available database of FCC actions does not identify any order that even refers to the TSS Registry, let alone mandates its creation or use.[26] The TSS Registry was created as a separate database without any involvement or authorization by the Commission. It is, pure and simple, one of many commercially available databases created by various entities in pursuit of their own commercial interests.

Somos is free to pursue its business interests and to market the use of the TSS Registry to industry members that see it as providing value. But it is improper for Somos to invoke Commission authority to grant to its database a monopoly position in verifying and validating subscriber identity and control. The Commission should not succumb to Somos's gambit and grant a preferred position to Somos's commercial database. Therefore, Somos's request to mandate registration of text-enabled toll-free numbers in its commercial database should be denied.
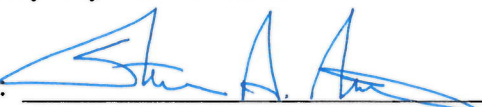
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[26]   Search of Bloomberg BNA's Telecommunications Law Resource Center,
         http://telecomlaw.bna.com/terc/, Keyword search of "TSS Registry" (last conducted
         Dec. 5, 2016).

CONCLUSION

For the foregoing reasons, Zipwhip respectfully submits that Somos's Petition for

Declaratory Ruling should be dismissed or denied.

Respectfully submitted,

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